Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1970

No. 327

GEORGE EDGAR BAIRD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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_____

Petitioner, George Edgar Baird, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on June 5, 1970, in the above entitled case.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, printed in Appendix A hereto, infra, page App. 1, is unreported at the present.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on June 5, 1970. This petition for Writ of Certiorari will be timely filed on or before July 5, 1970.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED

(1) Is the decision of a lower Court in direct conflict with the decisions of this Court going to prevail and be permitted to stand?

(2) Can one Federal Appellate Court render a decision in conflict with the decision of another Federal Appellate Court on the same facts and law applicable thereto, and such decision go unresolved by the Supreme Court?

(3) Can a Federal Appellate Court refuse to consider a Federal Legal and Constitutional issue raised before it for the first time, where the issue had not been raised before the Administrative Board involved or in the District Court, in a criminal prosecution, to wit, the right to legal counsel before the Administrative Board, where Federal Regulation expressly prohibited such counsel and at least six of the Federal Appellate Courts had sustained the validity and Constitutionality of such Regulation; but subsequent to an accused's conviction a Federal Appellate Court holds such Regulation invalid and the Supreme Court has granted review of a case involving this issue?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment's guarantee of "due process of law" and the Sixth Amendment's guarantee of the right to "counsel in all criminal prosecutions."

STATUTES AND REGULATIONS INVOLVED

Title 50, U. S. Code, Section 462;
32 C. F. R., Section 1622.30;
32 C. F. R., Section 1625.1;
32 C. F. R., Section 1625.2;
32 C. F. R., Section 1604.41;
32 C. F. R., Section 1604.71;
32 C. F. R., Section 1624.1 (b).

Cases Cited

Estep v. U. S., 327 U. S. 114, 66 S. Ct. 423;
Dickinson v. U. S., 3-9, 74 S. Ct. 152;
U. S. v. Freeman, 388 F. 2d 246;
U. S. v. Ransom, 233 F. 2d 15;
Haven v. U. S., 403 F. 2d 384 (9th Cir. 1969);
Merritt v. U. S., 401 F. 2d 768 (5th Cir. 1968);
U. S. v. Gapson, 347 F. 2d 959 (10th Cir. 1965);
Storey v. U. S., 370 F. 2d 255 (9th Cir. 1966);
U. S. v. Sturgis, 342 F. 2d 328 (3rd Cir. 1965);
Imboden v. U. S., 194 F. 2d 508 (6th Cir. 1952);
Peterson v. U. S., 173 F. 2d 111 (6th Cir. 1949);
Weller v. U. S., 309 F. Supp. 50 (N. D. Cal. 1969) **(review granted**, Supreme Court No. 1082, 38 U. S. L. W. 3366;
Cox v. U. S., 68 S. Ct. 115;
Gideon v. Wainwright, 83 S. Ct. 792.

STATEMENT OF THE CASE

This case arises under the Universal Military Training and Service Act (now Military Selective Service Act). Appellant was charged with violation of Section 462, Title 50, United States Code. The specific charge is that appellant failed to comply with an order of his local board to report for civilian work as a conscientious objector, to

Butterworth Hospital, Grand Rapids, Michigan, to perform two years of civilian work in lieu of induction into the armed forces.

The case was tried to a jury on July 7, 1969. At the close of all the evidence, and out of the presence and hearing of the jury, appellant moved for acquittal on two grounds: First, the local board acted arbitrarily in removing the defendant from class 3-A and placing him class 1-A, and subsequently in 1-O and ordering him to report for civilian work; second, that the local board acted arbitrarily in refusing to reopen defendant's classification after the presentation of entirely new evidence to support his claim to the hardship-dependency status. The Court overruled said motion. The case was then submitted to the jury, by argument of counsel and instructions from the Court, the jury returning a verdict of guilty as charged (Tr. 179). On July 19, 1969, the court suspended imposition of sentence, placed defendant on probation for a period of thirty months, the condition of the probation being that defendant would work twenty-four consecutive months at Butterworth Hospital. Defendant moved for an appeal (App. p. 10). On June 5, 1970, the Court of Appeals for the Sixth Circuit affirmed the conviction. Appellant now timely files this his petition for Writ of Certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

(1) The lower Courts have decided an important question of Federal law which is in direct conflict with the decision of the Supreme Court on the same matter.

In **Estep** and **Dickinson**, supra, and the legions of cases which have followed these land mark decisions, it has been held and is now well settled that the jurisdiction of

a local board (for purposes of judicial review) is reached only if there is no basis in fact for the board's classification. This is now an elementary rule to be applied in these cases. The local board recognized the hardship-dependency status of appellant by placing him in class 3-A on April 15, 1964, and retaining him in that class until February 8, 1966. In his original questionnaire, under series VIII, registrant claimed his mother and sister as dependents on March 6, 1964, the local board was furnished a doctor's certificate showing the mother's condition of health and that the mother and minor sister were dependent upon registrant for support (App. E-10). On April 15, 1964, registrant appeared before the local board relative to the matter of supporting his mother and sister. In a memorandum of the same date, the local board noted that registrant was to be classed in 3-A (App. E-11). The board so notified registrant by letter dated April 17, 1964 (App. E-12). On August 10, 1965, in a dependency questionnaire furnished by registrant to local board registrant claimed his mother as a dependent. By this time his sister was gainfully employed (App. E-14). On August 10, 1965, registrant's mother requested a personal appearance before the board, which was granted, and on August 11, 1965, the local board wrote registrant a letter pointing out that in view of the information presented by his mother, he would be retained in 3-A until February 10, 1966 (App. E-23). On February 23, 1966, registrant appeared before the local board. A memorandum filed by the local board on that date, among other things, stated:

> "The board informed registrant that he was granted deferments up until this time, and that he was informed also that he would be processed for induction on the expiration of the present one, and was advised to place his affairs in order so that he would be available."

He was at the time in 1-A (App. E-24). By letter dated March 20, 1966, registrant wrote the draft board of appeals at Lansing, Michigan relative to his reclassification from 3-A to 1-A. Whether his letter to the board of appeals was timely and appropriate may be questioned, but what is contained in the letter is significant, particularly paragraphs 3 and 4:

> "I ask why I was reclassified because I was still head of a household and still the sole support of my mother, because she could no longer work.
> They said because the time before when I was given a deferment I was supposed to join the National Guard so I could stay home and work also."

It would appear from these statements that the local board took away his deferred status of 3-A because he had not joined the National Guard. At least there is nothing in the record to negative his statement on this point (App. E-26).

On April 4, 1966, registrant returned to his local board the special form for conscientious objectors. He had previously explained to his local board why he had not filed this form before, as shown in the February 23, 1966, memorandum of the local board, supra.

On August 16, 1967, registrant furnished to his local board information that he had married on July 22, 1967, as shown on the report of oral information (App. E-33).

On November 24, 1967, registrant wrote the local board pointing out that he could not accept civilian work because it would cause hardship for his family and dependents. He requested an appearance before the local board, and on November 24, 1967, he went to the local board office on the same day he wrote the letter. In the report of oral information for that date, he said he would find

it a hardship to accept any employment of this nature, that his wife and mother would be without means of support (App. E-36). On December 5, 1967, registrant appeared before the local board, and in a memorandum filed by the local board that date, it is stated that registrant mentioned that his mother and wife were dependent upon him and also his wife had brain surgery. The board on December 6, 1967, wrote a letter to registrant informing him that the information presented did not warrant the reopening of his case (App. E-39).

And while it is true that on January 16, 1968, registrant appeared before the board, and among other things, pointed out to the board that he could not accept the civilian work because it would violate his Christian conscience and be a compromise, yet this in no wise distracts from or minimizes his right to the 3-A classification as for a hardship-dependency status.

The evidence produced by registrant upon the trial of his case strongly substantiated the prima facie case he had already established before his local board by the documents hereinabove referred to.

Upon the trial of the case, the government attempted to establish that after August 26, 1965, the deferred status for a married registrant ceased to exist (Tr. 32-34). An excerpt from that testimony is noteworthy:

> "The Court: So, under the regulations as they were on August 26, 1965, the board could not consider the marriage as granting him an exemption——
> The Witness: No, sir.
> The Court: ——standing alone?
> The Witness: No, sir.
> The Court: Could they still consider a hardship?
> The Witness: Yes, they could."

The witness in this case was Mrs. Frances Drake, clerk of the registrant's local board, the government's own witness, on direct examination. Thus from the government's own witness it was established that even after August 26, 1965, though a registrant could not claim and get a deferment solely because he was married and claiming his wife as a dependent, he can still claim and get the hardship-dependency status and classification.

The testimony of registrant himself with reference to supporting his wife from July 22, 1967, onward is significant:

> Q. Now, from the time you married what was the date of your marriage again? A. July 22, 1967.
>
> Q. From that date until you received your order to report for civilian work, was your wife gainfully employed at any time? A. No.
>
> Q. Were you the sole support of your wife during that period of time? A. Yes.
>
> Q. Why didn't your wife work? A. Well, when she got out of the hospital, about in February—no, it was March, she was in the hospital from about October, I think—or March, it was around six months, 1967—when she came out she did have a part-time job at the university which she held before she had to go for this operation, she tried to go back to school, but she had to quit both of these. She couldn't even attend school half a day because she was still recovering from her operation.

At the end of the year the principal let her take her examination, so that she got her diploma now, but she couldn't maintain that. And as she continued, well, up to this time, still she's never looked for work. She at times has even had a time keeping up with her work at home (Tr. 79-80).

Registrant's mother testified that she was not gainfully employed in 1967 or 1968. Note her testimony:

> Q. Now, were you gainfully employed at all in 1967? A. No.
>
> Q. In 1968? A. No. I have——
>
> Q. Why not? A. Well, I have not been able to work. If I do try to—it was contact dermatitis I had—whatever I came in contact with or worked with in the beauty shop, it would break out and I couldn't use my hands. And it isn't only that. I have very bad legs. I have vericose veins and spurs on my heels.
>
> Q. Now, during 1966, and 1967, and 1968 were you wholly dependent upon your son for support? A. Oh, yes. Completely (Tr. 111).

The testimony of registrant's wife is significant, too, on the issue of hardship-dependency:

> Q. Are you related to the defendant here? A. Yes. He is my husband.
>
> Q. Now, since you married him in July of 1967, I believe, have you done any work of gainful nature? A. No, I have not.
>
> Q. Have you earned any money at all during 1967 and 1968? A. No.
>
> Q. Why? A. Because of my health (Tr. 121).

It would be difficult to conceive of a greater hardship situation than presented by this case, where the mother, with a skin disease, was unable to work and depended upon her son solely for support, the wife had a brain operation, was unable to work, and depended upon her husband solely for support. It mocks the most elementary principle of truth and justice to say that there was a basis in fact for denying registrant the 3-A classification. He made out a prima facie case for such classification.

there was no basis in fact for denying it, and the court should have sustained the motion for judgment of acquittal on this issue, and the matter should never have gone to the jury.

The principal evidence in this case was the documentary evidence supplied by the registrant to his local board during 1966, 1967 and 1968 relative to his claim and entitlement to the hardship-dependency status of 3-A. When defendant presented his motion for judgment of acquittal, the court summarily denied said motion (Tr. 127-128). The court did not take time to examine and study the entire selective service file, which is an absolute prerequisite to the proper consideration and decision on one of these cases. While it is true that some of the documentary evidence was testified to and read into the record during the trial, at the same time it was the duty and obligation of the court to research the record for some evidence to establish a basis in fact for denial of the 3-A classification by the local board. On this point alone defendant's conviction should be reversed.

(2) The lower Courts have decided an important question of Federal law and rendered a decision thereon in conflict with the decisions of the Court of Appeals for the Seventh Circuit.

Legion are the cases arising under **SS Regulations 1625.1** and **1625.2**, supra, with regards to the reopening of a registrants' classification upon his submission of new evidence, which if true, would change his classification. **Ransom** and **Freeman**, supra, are but few of such cases. Under these Regulations and the cited cases, with the evidence the defendant had before his local board and that which was produced upon the trial of his case in support thereof, there was no basis in fact for the board's refusing to reopen registrant's classification, particularly in view

of the fact that it would at all times have worked an extreme hardship on registrant and his mother had he been required to do any type of service, and more particularly after he married July, 1967. The extremity of the hardship was compounded when the registrant married and he had both his wife and his mother totally dependent upon him. It was arbitrary of the local board to refuse to reopen his classification based upon the evidence before it. The conviction of defendant should be reversed on this point alone. It appears on the face of the record.

(3) The Court of Appeals erred in refusing to consider the issue of denial of legal counsel before the local board under 32 C. F. R., Section 1624.1 (b) solely because the question had not been raised before the local board and in the District Court, while taking note that the Supreme Court has granted review of a case involving this issue.

At the time of the trial of defendant, most of the Circuit Courts had held that denial of representation by legal counsel before the local board was not illegal or unconstitutional. In the **Haven, Merritt, Capson, Storey, Sturgis, Imboden** and **Peterson cases**, supra (the latter two cases decided by the Sixth Circuit), it had been so held. Little reason was there for defendant to raise this issue before the local board or in the District Court, since the question had been decided adversely to defendant by the Circuit Court in the District in which he was tried. But subsequent to his trial, the Ninth Circuit in **Weller**, supra, sustained defendant's motion to dismiss the indictment on the grounds that such denial of counsel was not authorized by Congress and its constitutionality could not be sustained. This Court has now agreed to review a case involving this issue, to wit, **Weller**, supra.

Though the hearing before a local board is an administrative one, this Court has held in **Cox v. United States**,

supra, that there can be no de novo evidence upon the trial of a Selective Service case in a criminal prosecution but that the defendant is limited in his offer of evidence to what is contained in his Selective Service file. The hearing before the local board therefore is just as important and the need for legal counsel as great as in a criminal prosecution (aside from Selective Service cases) where the accused does have legal counsel and where he can offer all de novo evidence. In **Gideon v. Wainwright,** supra, and the numerous cases which have followed it, this Court has spelled out clearly and unmistakably the right to counsel.

And for good reasons shown, though defendant here did not raise this issue before the local board or in the District Court, he should be permitted to avail himself of the favorable decisions that have followed his trial and conviction.

CONCLUSION

This case presents three Federal Legal and Constitutional questions in a clearly justiciable setting. This Court should issue its Writ of Certiorari in order that it may consider and decide these questions. Petitioner prays that this Court will issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted

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